Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DONALD DOSTIE,

PETITIONER,

v.

STATE OF MAINE,

RESPONDENT

ON WRIT OF CERTIORARI TO THE

MAINE SUPREME JUDICIAL COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES THE FIFTH AMENDMENT'S PROHIBITION AGAINST DOUBLE JEOPARDY BAR THE STATE OF MAINE FROM CRIMINALLY PROSECUTING A DEFENDANT FOR OPERATING UNDER THE INFLUENCE OF INTOXICATING LIQUOR WHEN THE STATE HAS PREVIOUSLY SUSPENDED A DEFENDANT'S DRIVER'S LICENSE FOLLOWING A CONTESTED ADMINISTRATIVE HEARING ARISING OUT OF THE SAME CRIMINAL CHARGE?

PARTIES TO THE CASE

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Petitioner,

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PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

The Petitioner, Donald J. Dostie, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Maine Supreme Judicial Court entered June 8, 1995.

OPINIONS BELOW

On January 25, 1994, Petitioner Donald J. Dostie received a Notice of Suspension and Opportunity for Hearing from the Maine Secretary of State on a charge of operating under the influence of intoxicating liquor. Petitioner filed a petition for reconsideration and request for hearing and on January 31, 1994, the Secretary of State ordered a stay of Petitioner's license suspension. The Secretary of State ordered that a hearing be held under 29 M.R.S.A. §1311-A. Following a contested administrative hearing before the Department of the Secretary of State on February 24, 1994, during which Petitioner was represented by counsel, the Secretary of State denied the petition for reconsideration and ordered the continued suspension of Petitioner's driver's license.

On January 11, 1995, Petitioner filed a Motion to Dismiss the criminal complaint against him for operating under the influence of intoxicating liquor (OUI) on grounds of Double Jeopardy. Kennebec County Superior Court Justice Robert E. Crowley in a written opinion denied Petitioner's Motion on January 31, 1995. See Appendix 12. Petitioner timely filed his Notice of Appeal to the Maine Supreme Judicial Court on February 3, 1995. The Maine Supreme Judicial Court stayed Petitioner's appeal pending its decision in *State v. Savard* and *State v. Greeley*. On June 8, 1995, the Maine Supreme Judicial Court denied Petitioner's appeal, affirming the Superior Court's decision below, and remanded

Petitioner's case for trial in Kennebec County Superior Court. See Appendix 1. In denying Petitioner's Motion to Dismiss, the Maine Supreme Judicial Court relied upon its recent decision in *State of Maine v. Savard* and *State of Maine v. Greeley*, Law Ct. Doc. Nos. AND-95-5 and KEN-95-46, (June 6, 1995). See Appendix 2.

JURISDICTION

The Maine Supreme Judicial Court's judgment denying Petitioner's appeal was entered on June 8, 1995. The Maine Supreme Judicial Court remanded Petitioner's case to Superior Court for criminal trial. No trial date has yet been set.

Petitioner invokes 28 U.S.C. §1257(a) as conferring on the Supreme Court of the United States jurisdiction to review the judgment in question upon Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 M.R.S.A. §1311-A
29 M.R.S.A. §1312-B

These pertinent statutes are reproduced and set forth in the attached Appendix.

The petitioner cites the Fifth Amendment of the United States Constitution which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On November 28, 1993, the Augusta Police Department charged Petitioner Donald Dostie with operating a motor vehicle under the influence of intoxicating liquor. The criminal complaint alleged that Petitioner Dostie operated a motor vehicle while under the influence of intoxicating liquor or drugs or a combination of liquor and drugs or while having 0.08% or more by weight of alcohol in his blood. Upon arraignment, Petitioner Dostie pleaded innocent to this charge.

Petitioner Dostie received a notice stating that the State of Maine, Secretary of State had administratively suspended his license to operate a motor vehicle. The administrative suspension was based upon a law enforcement officers' report to the Secretary of State filed by the arresting officer which set forth grounds for his belief that Petitioner Dostie committed the offense of operating or attempting to operate a motor vehicle with an excessive blood alcohol level and which also forwarded the results of blood alcohol tests taken on November 28, 1993. The Secretary of State cited as statutory authority for the administrative suspension Title 29, §1311-A of the Maine Revised Statutes Annotated, which provides that the Secretary of State shall suspend the license of any person upon his determination that the person operated or attempted to operate a motor vehicle with an excessive blood alcohol level. This statute defines "operating or attempting to operate a motor vehicle with an excessive blood

alcohol level" as operating or attempting to operate a motor vehicle "while having 0.08% or more by weight of alcohol in the blood."

Petitioner Dostie requested a hearing to contest the administrative suspension. On February 24, 1994, a hearing was held to litigate issues surrounding Petitioner Dostie's stop, arrest, alcohol testing and allegations that he operated a motor vehicle with excessive blood alcohol. The hearing officer upheld the Secretary of State's determination of suspension in a summary decision dated February 25, 1994. Even though the administrative license suspension may be based on similar facts arising out of the same arrest, the Secretary of State's administrative license suspension could not be rescinded or changed by the ultimate disposition of the criminal charges pending against Petitioner Dostie, even if he was acquitted of the criminal charge. 29 M.R.S.A. §1311-A.

Thus, in addition to the administrative license suspension, the State of Maine sought to try Petitioner Dostie on the criminal charge of operating under the influence of intoxicating liquor under 29 M.R.S.A. §1312-B. On January 11, 1995, prior to his jury trial, Petitioner Dostie filed a Motion to Dismiss the criminal complaint against him in Kennebec County Superior Court. Petitioner Dostie asserted and moved to dismiss the criminal charges against him on grounds that his subsequent criminal prosecution for operating under the influence of intoxicating liquor constituted the State's attempt to punish him twice

for the same conduct and thus violated the United States Constitution's Fifth Amendment of prohibition against Double Jeopardy as well as the State of Maine's prohibition against Double Jeopardy found in Article I §8 of the Maine Constitution.

In a written decision on January 31, 1995, Justice Robert E. Crowley of the Kennebec County Superior Court denied Petitioner Dostie's Motion to Dismiss. Justice Crowley said although the administrative license suspension and the pending criminal charge were separate proceedings based on the same transaction, the administrative license suspension was not "punishment" for the same offense but rather served the remedial purpose of deterring drunk driving and promoting highway safety. He said the legislative intent of the administrative license suspension statute revealed that punishment was not one of the goals of suspension. Thus, he ruled the administrative adjudication of suspension did not bar a subsequent criminal trial arising out of the same arrest. Justice Crowley viewed cases in other jurisdictions which had reached contrary results as "wrongly decided" and distinguishable from the instant case.

Within three days, Petitioner Dostie timely filed his Notice of Appeal to the Maine Supreme Judicial Court on February 3, 1995. Under Maine law, the appeal of an order denying a Motion to Dismiss for violation of Double Jeopardy is immediately appealable. See e.g., *State v. Lebroke*, 589 A.2d 941 (Me. 1991); *State v. Flick*, 495 A.2d 339

(Me. 1985); *State v. Hanson*, 483 A.2d 723 (Me. 1984). On February 9, 1995, the Maine Supreme Judicial Court ordered that all proceedings in Petitioner Dostie's appeal be stayed pending their decision in *State v. Savard* and *State v. Greeley*, Law Ct. Doc. Nos. AND-95-5 and KEN-95-46, (June 6, 1995). On June 6, 1995, the Maine Supreme Judicial Court issued its written decision on whether a criminal prosecution for operating under the influence of intoxicating liquor (OUI), under 29 M.R.S.A. §1312-B (Pamph. 1994), following a contested administrative hearing affirming the suspension of a motor vehicle driver's license for OUI under 29 M.R.S.A. §1311-A (Pamph. 1994), was barred by Constitutional prohibitions against Double Jeopardy. The facts of the *Greeley* and *Savard* cases were identical to those of Petitioner Dostie with the exception that the driver's licenses of Savard and Greeley had been automatically suspended for 90 days for driving with a blood alcohol level of 0.08% or more as opposed to the one year license suspension imposed on Petitioner Dostie.

Relying on this Court's holding in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ____ 128 L.Ed 2d 767 (1994), the Maine Supreme Judicial Court found that Constitutional prohibitions against Double Jeopardy will bar a Petitioner's criminal prosecution only if (1) punishment is for the same offense; (2) suspension in the criminal prosecution occurred in a separate proceeding; and (3) the suspension constitutes punishment. After finding that the license suspension and the criminal

prosecution sought redress for the commission of the same offensive conduct and that they constituted separate proceedings, the Maine Supreme Judicial Court considered whether the revocation or suspension of a driver's license constituted punishment. The Maine Court reasoned that ownership of a motor vehicle driver's license was a privilege conditioned upon compliance with agreed conditions. Analogizing ownership of a motor vehicle driver's license to that of the possession of professional licensing and certification, the Maine Court said revocation of a driver's license was non-punitive in character. It said the Maine Legislature intended the license suspension statute to serve as a means to insure public safety. Relying on language in the statute which stated its purpose, the Maine Court said any punitive or deterrent purpose served by a license suspension following an arrest for OUI was merely coincidental to the overriding purpose of providing the public with safe roadways. Thus, it sustained the denial of the Petitioners' Motion to Dismiss on grounds of Double Jeopardy.

Two days after its ruling in *Savard* and *Greeley*, the Maine Supreme Judicial Court denied Petitioner Dostie's appeal and remanded his case to Kennebec County Superior Court for a jury trial on the criminal charge of OUI. Petitioner Dostie now faces a jury trial on criminal charges of OUI even though his one year license suspension has been completed.

Petitioner Dostie invokes the jurisdiction of the Supreme Court of the United States pursuant to 28

U.S.C. §1257(a) which provides that final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution or laws of the United States and where any right is set up or claimed under the Constitution. The Maine Supreme Judicial Court's denial of Petitioner Dostie's appeal constitutes an exception to the final judgment rule since the denial of Petitioner's Motion to Dismiss on Double Jeopardy grounds was immediately appealable under Maine law. The right to be free from exposure to Double Jeopardy requires that a challenged prosecution be subject to review before the exposure occurs. *State v. Hanson*, 483 A.2d 723, 724 (Me. 1984). Petitioner Dostie appealed under the exception to the final judgment rule regarding pre-trial motions based on Double Jeopardy grounds. *Id.*; *State v. Flick*, 495 A.2d 339, 341 (Me. 1985). The Supreme Court of the United States has concluded that a pre-trial order denying a Motion to Dismiss on Double Jeopardy grounds is immediately appealable. *Abney v. United States*, 431 U.S. 651, 662, 97 S.Ct. 2034, 2041, 52 L.Ed 2d 651 (1977).

REASONS FOR GRANTING WRIT OF CERTIORARI

1. In ruling that Maine's administrative license suspension statute serves the singular and purported remedial purpose of public safety, the Maine Supreme Judicial Court misinterpreted the recent rulings of the Supreme Court of the United States in similar deliberations on Double Jeopardy issues. The Supreme Court of the United States' decisions are unclear whether Double Jeopardy attaches where a civil sanction has mixed goals, both punitive and non-punitive or remedial.

The Double Jeopardy Clause prohibits more than one "punishment" for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed 2d 656 (1969). The pending criminal OUI trial in Petitioner Dostie's case, if it results in a conviction, would, of course, subject him to punishment. Thus, if his prior civil or administrative license suspension proceeding, which was predicated on the same OUI offense as charged in his indictment, constituted a "punishment," the Double Jeopardy Clause will bar the pending criminal trial. Thus, the Maine Supreme Judicial Court's view as to what constitutes "punishment" has important Constitutional ramifications for the Petitioner.

This Court has classified a civil sanction for wrongful conduct as a "punishment" under the Double Jeopardy Clause when the sanction served a traditional goal of punishment, that is, deterrence or retribution, instead

of some remedial goal to government or society in protecting itself from that wrongful conduct. *United States v. Halper*, 490 U.S. 435, 448-449, 109 S.Ct. 1892, 1902, 104 L.Ed 2d 487 (1989). This Court reasoned that a government imposed sanction, which was labeled as "criminal" or "civil," constituted punishment under the Double Jeopardy Clause if- and only if- the sanction "as applied in the individual case served the goals of punishment," that is, retribution and deterrence, instead of only the traditional remedial purposes of the government in preventing defendant's wrongful conduct. Id. at 448, 109 S.Ct. at 1899-1902 [Emphasis Added].

In *Halper*, this Court first found that the label "criminal" or "civil" was a distinction without a difference, because a civil as well as a criminal sanction constitutes punishment when the sanction, as applied, serves the goal of punishment. This Court stated:

> "A civil sanction that cannot fairly be said solely to serve the remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." [Emphasis Added]. Id. at 448, 109 S.Ct. at 1901.

The Maine Supreme Judicial Court has erred in accepting the stated and purported goal of Maine's license suspension statute as being solely remedial for the purported purpose of "public safety." [Emphasis Added].

Its ruling ignores the *Halper* test of whether the statute in question serves at least in part to punish. Also, the Maine Supreme Judicial ignored the Supreme Court of the United States' statement in *Mackey v. Montrym*, 443 U.S. 1 (1979) that a summary sanction of a license suspension for refusing to take a breath test "serves as a deterrent to drunken driving."

This Court utilized the *Halper* test in analyzing the forfeiture statute in *Austin v. United States*, 113 S.Ct. 2801, 125 L.Ed 2d 488 (1993). In *Austin*, the issue was whether the excessive fines clause of the Eighth Amendment applied to forfeitures of property under the Federal Controlled Substance Forfeiture statute. 21 U.S.C. §881 (West Supp. 1994). After summarizing the history of common law forfeitures, this Court concluded with the observation that "this Court...consistently has recognized that forfeiture serves, at least in part, to punish the owner." [Emphasis Added]. *Austin*, 113 S.Ct. at 2810. The Court in *Austin* found that if forfeiture does not solely serve a remedial purpose, but also serves as a retributive or deterrent purpose, it is punishment. Id. 113 S.Ct. at 2812. [Emphasis Added]. A statute may be remedial but that does not necessarily mean the sanctions imposed thereunder are solely remedial. *United States v. Hudson*, 14 F.3d 536, 542 (10th Cir. 1994).

In *Department of Revenue v. Kurth Ranch*, 114 S.Ct. 1937, 128 L.Ed 2d 767 (1994), this Court noted that criminal fines, civil penalties, civil forfeitures, and taxes not only

generate government revenues, but also impose fiscal burdens on individuals, deter certain behaviors, and are subject to Constitutional restraints. *Kurth Ranch*, 114 S.Ct. at 1943 [Emphasis Added]. This Court characterized such fines, penalties and forfeitures readily as sanctions. Id. at 1946. The Court further found that parallel criminal and civil proceedings were "separate" for Double Jeopardy purposes.

Furthermore, this Court in *Kurth Ranch* cited *Halper* for the proposition that "the legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character." The Court noted that Double Jeopardy protection is "intrinsically personal" and that only "the character of the actual sanctions" can substantiate a possible Double Jeopardy violation. See *Halper*, 490 U.S. at 447, 104 L.Ed 2d 487, 109 S.Ct. 1892.

The Ninth Circuit decision of *U.S. v. $405,089.23 in U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994) cited *Austin, supra*. in stating:

> "Just last year, it [Supreme Court] reaffirmed its new found wisdom, emphasizing against that a sanction which is designed even in part to deter or punish will constitute punishment regardless of whether it also has a remedial purpose."

Significantly, the Maine Supreme Judicial Court's decision in *State v. Savard et al.* does not cite as

authoritative these recent expressions on the dynamics of the Double Jeopardy prohibition enunciated by this Court. Hence, under the guise of an avowed and stated remedial purpose of "public safety", the Maine Supreme Judicial Court has ignored the way in which Maine's license revocation statute actually works within the context of Maine's campaign against drunk drivers. Although Maine intended its civil forfeiture and administrative suspension statute to be a powerful weapon on its war on drunk driving, the Petitioner's Constitutional rights and the prohibition of Double Jeopardy should not be made a casualty of this war under the guise of statutory construction. Clarification of this issue by this Court is necessary to ensure that important Constitutional prohibitions are not being brushed aside for the sake of statutory expediency.

2. Despite the Maine Supreme Judicial Court's characterization otherwise, Maine's administrative license suspension statute is "punishment." The Maine Supreme Judicial Court's decision in Petitioner's case and its interpretation of Maine's license revocation statute as one promoting "public safety" do not explain all aspects of the Maine statute. The Maine statutes have characteristics that are clearly punitive.

For instance, under the Maine statutory scheme, an administrative license suspension continues regardless of the outcome of the subsequent criminal proceedings. Thus, an acquittal in the criminal proceeding does not end the

suspension. If it has been judicially determined that a person did not drive under the influence of alcohol as defined by the criminal statute, it is unclear what remedial purpose is served by the continuing suspension of his license.

Also, under the Maine statutes, the length of the "remedial" suspension is determined by the length of the suspension that a defendant would face under the criminal statute. Furthermore, the term of the license suspension increases as the number of prior OUI offenses increase. This lends credence to the argument that Maine's license suspension statute is not solely remedial in nature but rather punishment as well. Similarly, if Maine license revocation statute was passed solely for the purpose of removing drunk drivers from the public roadway, why does the statute allow such suspended drivers to obtain a work-restricted license and operate vehicles during pre-determined hours? See 29 M.R.S.A. §1311-A(5-A) (Pamph. 1994).

During the legislative debates on the passage of the license revocation statute, Maine legislators often termed the statute as a "very strict and severe punishment" or a way for "society to avenge itself immediately" or as "harsh medicine" for drunk drivers. *Maine House Legis. Record*, June 10, 1983, p. 1239-1243 and June 15, 1983, p. 1292. That the statute was intended also as a form of punishment is demonstrated by the fact that both the administrative suspension statute and the criminal OUI statute are closely intertwined and cross-referenced. Both the

administrative suspension statute and the criminal OUI statute contain suspension provisions which, in fact, are served concurrently not independent of each other. Thus, the administrative license suspension under 29 M.R.S.A. §1311-A is deducted from any period of time a suspension is imposed under the criminal OUI statute.

Under the Maine law, the license suspension cannot be avoided or reduced by an acquittal in the criminal case, or by any exceptional circumstances or submission to alcohol treatment except for granting of a work-restricted license. The Maine Supreme Judicial Court also ignored the fact that under Maine law, driver's license suspensions are used for punishment in other contexts, such as for failure to pay child support. 29-A M.R.S.A. §2459. Thus, to characterize driver's license suspensions as merely remedial for the purposes of "public safety" does not take into account the dynamics or actual workings of the driver's license suspension statute in combination with the criminal OUI and other statutes.

Furthermore, driver's license suspensions in a rural state such as Maine which has little or no public transportation outside of its major metropolitan areas impose significant hardships on persons subject to an administrative license suspension. There are financial consequences outside of the use of public transportation that the State imposes upon those persons whose licenses have been suspended. In order to be reinstated, a defendant must pay the

Secretary of State a license renewal fee of $25.00 before the State will lift the suspension. The State also requires a statement of insurability (SR-22) before a license suspension is lifted.

Under Maine's Implied Consent statute, 29 M.R.S.A. §1312 (Pamph. 1994), a police officer must warn a motorist, in unmistakable terms, that the consequences of refusing to submit to an alcohol breath test may be suspension of his license from six months to three years depending on the existence of prior violations or refusals. The Maine Law Court cases which have construed this Implied Consent statute describe license suspension as one of the "penalties" for refusing to submit to an alcohol test. *State v. Roberts*, 609 A.2d 703, 704 (Me. 1992); *Marino v. Secretary of State*, 392 A.2d 1081 (Me. 1991). The Maine Law court has also pointed out the "deterrent" effect that license suspensions under the Implied Consent statute have in preventing the operation of motor vehicles by intoxicated persons. *State v. Chisholm*, 565 A.2d 92, 93 (Me. 1989).

Thus, the Maine Supreme Judicial Court's characterization of its license revocation statute as purely "remedial" for the purpose of public safety ignores the punitive and penal aspects of that statute which bring it within the ambit of the Constitutional prohibitions against Double Jeopardy under the *Halper* decision.

3. A driver's license is a constitutionally protected interest, not merely a privilege as the Maine Supreme Judicial Court has viewed it.

Bell v. Burson, 402 U.S. 535 (1971). Yet, confusion exists in courts throughout the nation on what impact, if any, the Supreme Court of the United States' decisions in *Kurth Ranch*, *Austin* and *Halper*, *supra* have upon criminal prosecution for activities upon which a state has already exacted the civil and administrative sanction of license suspension for OUI.

Thirty-seven states allow administrative license suspensions separate and apart from criminal trials for OUI. The Maine Supreme Judicial Court was the first State Supreme Court to consider whether an administrative license suspension for OUI bars a subsequent criminal trial for the same offense on Double Jeopardy grounds.

However, trial courts in a majority of state jurisdictions have ruled that the Constitutional prohibition against Double Jeopardy bars the criminal prosecution of a defendant whose driver's license has previously been administratively suspended in a separate proceeding. See *e.g.*, *Arizona, State v. Borjorquez*, No. 95004189, (Tuscon City Court, May 10, 1995); *State of Ohio v. Gustafson*, No. 93-TR 5344 A, B (Mohoning Cty., Nov. 16, 1994); *State of Florida v. Reilly*, No. 94-6661 MM10 (Broward Cty., Dec. 22, 1994); *State of South Carolina v. Soloman*, No. 94-GS-07-28877 (Bluffton Twp. Magis. Ct., June 8, 1995); *Commonwealth of Virginia v. Derflinger*, No. 95-038512, (Fairfax Cty., D.C. May 31, 1995); *People of California v. Ford*, No. TCR-234968 (Sanoma Cty., Munic. Ct. June 30, 1995); *City of Independence, Mo.*

v. Albin, No. 686165 (Independence, MO Munic. Ct. June 28, 1995); *State of North Dakota et al. v. Powell*, No. 94K-0068 (Stark Cty., N.D. D.C. June 21, 1995); *City of Salina v. Baier*, No. 94-TRI-17353-55 (Salina Munic. Ct. (Kansas), Feb. 23, 1995); *City of Seattle v. Savaria*, No. 215563 (Seattle, Wa. Munic. Ct., Feb. 9, 1995); *State of Idaho v. Bendele*, No. CR-94-01200-M, (Minidoka Cty. D.C., Jan. 23, 1995).

Recently, the Supreme Court of the state of Hawaii has ruled that Double Jeopardy prohibitions do not attach to its state's license suspension statute since the law's purpose was to protect the public by removing potentially dangerous drivers from the road. *State of Hawaii v. Higa*, No. 17737, (Ha. S.Ct., May 17, 1995). Other state, intermediate courts of appeal have followed suit. See *e.g.*, *State of Arizona v. Snow*, No. 1-CA-SA-95-0102, (Az. App. Ct., June 6, 1995); *Davidson v. MacKinnon*, No. 95-1009, (Fla. 5th Dist. App. Ct., June 2, 1995); *State of Ohio v. Miller*, No. 2-94-32, (Oh. App. Ct. 3rd Dist., May 10, 1995).

However, a Court of Appeals in a separate district in the state of Ohio has ruled that their administrative license suspension in fact constituted punishment and did bar a subsequent criminal proceeding arising out of the same transaction, uphold the trial court's decision below. *State of Ohio v. Gustafson*, No. 94CA232, (Oh. App. Ct., 7th Dist., June 27, 1995). A Court of Appeals in Minnesota has also debated this issue with one concurring Judge commenting that the state's argument that suspensions are purely

"remedial" is a "mantra" that "has to be disregarded if we are to remain honest with our citizens." A second concurring Judge stated that "license revocation has always had characteristics of punishment" but concurred because punishment was not the Minnesota statute's predominant purpose. See *State of Minnesota v. Hanson*, No. C1-95-531 (Minn. Ct. of App., June 6, 1995).

The Ninth Circuit's recent decision *en banc* not to rehear arguments in *U.S. v. $405,089.23 in U.S. Currency, supra.* has added strength to the argument that a subsequent criminal proceeding is barred under Double Jeopardy prohibitions if there has been a previous, contested administrative license suspension hearing. Many of the decisions at the trial court levels in many states have cited *U.S. v. $405,089.23 in U.S. Currency, supra.* as authority for dismissing criminal proceedings for OUI due to Double Jeopardy prohibitions. See *e.g., State of Ohio v. Gustafson, supra.*

Without the Supreme Court of the United States' guidance on this issue to clarify its prior decision and the extent to which civil forfeitures and suspensions bar subsequent criminal prosecutions, this important question of Constitutional law will remain unsettled and in conflict with applicable U.S. Supreme Court decisions as well as decisions in the Ninth Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, Petitioner Dostie respectfully asks that his Petition for Writ of Certiorari be granted to resolve this important Federal and Constitutional question which has not been, but should be, settled by this Court and since the Maine Supreme Judicial Court's decision on this federal question appears to conflict with applicable decisions of this Court.

Dated:
1/10/96

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APPENDIX

Order of Maine Supreme Judicial Court	A.1
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STATE OF MAINE SUPREME JUDICIAL COURT
Kennebec, ss. SITTING AS THE LAW COURT
Law Docket Nos. Ken-95-79,
Oxf-95-95, Cum-95-96,
Wal-95-104, Ken-95-105,
Yor-95-140, Yor-95-141,
and Ken-95-142

STATE OF MAINE

v. ORDER

DONALD DOSTIE,
MICHAEL NEWMAN,
BRYAN PHINNEY,
TODD BUXTON,
ROBERT STEPHENS,
RALPH PRIOR,
JOHN LAMBERT,
BARBARA BRYER

Whereas the above named cases were stayed pending this Court's decision in State v. Savard and Greeley, Decision No. 7292, June 6, 1995 and

Whereas the judgments of the Superior Court were affirmed in State v. Savard and Greeley,

Now, therefore, it is ORDERED that the above named appeals are hereby DENIED and the judgments of the Superior Court are summarily affirmed. These cases shall be REMANDED to the Superior Court for further proceedings.

Dated: June 8, 1995

For the Court,

_____
Chief Justice

Signed by: David E. Wathan

(A.1)

Maine Supreme Judicial Court
Dec. No. 7292
Law Docket Nos And-95-5 and
Ken-95-46

STATE OF MAINE

v.

JOHN SAVARD

STATE OF MAINE

v.

KELLY GREELEY

Argued April 12, 1995
Decided June 6, 1995

Before WATHEN, C.J. and ROBERTS, GLASSMAN, RUDMAN, DANA and LIPEZ, JJ.

In this consolidated appeal, we are asked to determine whether a criminal prosecution for operating under the influence of intoxicating liquor (OUI), 29 M.R.S.A. §1312-B (Pamph. 1994)[1], following an administrative hearing affirming the suspension of a motor vehicle driver's license for OUI, 29 M.R.S.A. §1311-A (Pamph. 1994), is barred by the constitutional prohibitions against double jeopardy. We consider the denials of motions to dismiss the criminal complaints against John Savard and Kelly Greeley. Because we conclude that the constitutional prohibitions against double jeopardy do not bar the criminal prosecutions, we affirm the orders of the Superior

---

[1]. All citations herein to Title 29 have been repealed by P.L. 1993, ch. 683 §A-1 (effective Jan. 1, 1995).

Court. Each defendant's license was automatically suspended for 90 days for driving with a blood alcohol level of .08% or more by weight of alcohol in their blood, after which each requested an administrative hearing. See M.R.S.A. 1311-A(2) & 7. The suspension of each defendant's license was ultimately sustained. See 29 M.R.S.A. §1311-A(8). Thereafter, the State pursued separate criminal complaints against each of the defendants pursuant to 29 M.R.S.A. §1312-B.[2] Each defendant filed a motion to dismiss the respective complaint on the ground that the constitutional prohibitions against double jeopardy barred a further punishment for the same offense. Those motions were denied and appeals followed.

As a general rule, appeals may be taken only from final judgments. *State v. Lebroke*, 589 A.2d 941, 942 (me. 1991). A pretrial order, however, denying a motion to dismiss based on double jeopardy is immediately appealable under the exception to the final judgment rule that permits appeals when substantial rights of a party will be irreparably lost if review is delayed until final judgment. *Lebroke*, 589 A.2d at 942-43.

The Double Jeopardy Clauses of

---

[2] "A person is guilty of criminal violation...if he operates or attempts to operate a motor vehicle...[w]hile under the influence of intoxicating liquor or drugs; or...[w]hile having 0.08% or more by weight of alcohol in his blood." 29 M.R.S.A. §1312-B(1).

the United States Constitution[3] and the Maine Constitution[4] protect a criminal defendant from three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440 (1989). Before us, the defendants complain that they will be twice punished for the same crime. The constitutional prohibitions against double jeopardy will bar either defendant's criminal prosecution only if (1) punishment is for the same offense; (2) the suspension and the criminal prosecution occurred in a separate proceeding; and (3) the suspension constitutes punishment. *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 128 L.Ed. 2d 767 (1994). Because it is undisputed that the license suspension and the criminal prosecution seek redress for the commission of the same offensive conduct, we proceed directly to consider whether the license suspension and the subsequent criminal action occurred in separate proceedings.

I.

A defendant is protected not only from twice being tried for the same offense, but also from double punishment even when one of the actions does not involve a trial. *See*

---

[3] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb..." U.S. Const. amend. V.

[4] "No person, for the same offense, shall be twice put in jeopardy of life or limb." Me. Const. art. I, §8.

Halper, 490 U.S. at 440; *United States v. McCaslin*, 863 F. Supp. 1299, 1305 (W.D. Wash. 1994). Although some courts have treated separate civil forfeiture actions and criminal prosecutions for the same offense as "single coordinated prosecution," thus not implicating the constitutional prohibition, *see United States v. One Single Family Residence*, 13 F.3d 1493 (11th Cir. 1994); *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 922, 127 L. Ed. 2d 215 (1994), the United States Supreme Court has suggested a contrary rule. Even when filed close in time, the Court has indicated that a civil action aimed at exacting a penalty and a criminal prosecution arising out of the same offense constitute two separate proceedings when pursued separately and concluded at different times. *Kurth Ranch*, 128 L.Ed. 2d at 780 n. 21. *See also United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210, 1216 (9th Cir. 1994); *United States v. McCaslin*, 863 F.Supp. at 1304. We recognize that under our statutes the revocation of a driver's license subsequent to an arrest for OUI is part of an overall scheme developed by our Legislature for dealing with the very serious problem of drinking and driving. We conclude, however, that the civil action taken to suspend each defendant's driver's license occurred in a "separate" proceeding for purposes of our analysis under double jeopardy.

II.

Next, we must consider whether the revocation or suspension of a driver's license constitutes punishment. In *Halper*, the Supreme Court announces what it envisioned as

"a rule for the rare case." "[U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal proceeding many not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 449. Recognizing the difficulty in conducting that inquiry, the Court indicated that a violation of double jeopardy "can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *Id.* at 447.

> [T]he determination [of] whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of [what] the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goal of punishment.

Id. at 448.

The penalty before us has taken the form of the suspension of a driver's license. There exists no absolute right to obtain and hold a driver's license. *Opinion of the Justices*, 255 A.2d 643, 649 (Me. 1969). The driver's license is a privilege to which certain rights and responsibilities attach and for valid reasons involving public safety may be granted or withhold. *State v. Granville*, 336 A.2d 861, 863 (Me. 1975); *Opinion of the Justices*, 255

A.2d at 649. It is a special privilege, however, which carries with it certain due process rights. *Bell v. burson*, 404 U.S. 535, 539 (1971) ("[L]icenses are not to be taken away without that procedural due process required by the Fourteenth Amendment"). The defendants do not argue that their due process rights were violated.

When issued a license, the vehicle operator agrees to abide by certain conditions and rules of the road, *see e.g.*, 29 M.R.S.A. §§1071-1072 (1978 & Pamph. 1994) (lights); §§1151-1152 (1978) (passing); and §§1251-1255 (1978 & Pamphs. 1993 & 1994) (speed), and acknowledges that the continued use of the license to drive is dependent on compliance with the laws relating to vehicle operation. 29 M.R.S.A. §631 (1978). A licensee has no absolute right to ownership in a motor vehicle operator's license. A licensee's right to use the license is specifically conditioned on observing specified operating standards. The suspension of that privilege merely signifies the failure of the holder to comply with the agreed conditions. *See Opinion of the Justices*, 255 A.2d at 649; *Johnson v. Maryland*, 622 A.2d 199, 205 (Md. Ct. Spec. App. 1993) ([R]evocation of a voluntary privilege is 'characteristically free of the punitive criminal element.'"). We analogize the driver's license to professional licensing and certification, which, if abused, may be revoked in the same of public safety. *See e.g., Loui v. Board of Medical Examiners*, No. 16469, 1995 WL 69266 (Haw. Feb. 21, 1995) (revocation of medical license following criminal conviction for sexual abuse was intended to protect the public from

unfit physicians and, thus a legitimate nonpunitive government objective); *United States v. Furlett*, 974 F.2d 839 (7th Cir. 1992) (imposition of an absolute trading ban on commodities trader charged with fraud and conspiracy was remedial); *Schillerstrom v. Arizona*, 885 P.2d 156 (Ariz. Ct. App. 1994) (revocation of chiropractor's license was not barred by prior criminal conviction because purpose was to protect the public interest); *Mosher v. Richmond County Bd. of Comm'rs*, 428 S.E.2d 71 (Ga. 1993) (revocation of business license following nolo contendere plea to sex offense was not intended to serve as retribution thus not barred by double jeopardy). Revocation of the license is nonpunitive in character.

Looking to the specific state purpose of the statute and the legislative history implementing the statutory authority of the Secretary of State to suspend a driver's license, our proposition that the revocation is remedial is confirmed. The language of the statue clearly states its purpose:

> **§1311-A. Suspension on administrative determination for operating with an excessive blood-alcohol level**
>
> **1. Purpose.** The purpose of this section is:
> **A.** To provide maximum safety for all person who travel or otherwise use the public highways of the State; and
> **B.** To remove quickly from the public highways of this State those persons who have shown themselves to be a safety hazard by operating

or attempting to operate a motor vehicle with an excessive blood-alcohol level.

The Legislature intended the suspension to serve as a means to ensure public safety. The state of fact accompanying the bill through the legislative process evidences this intent. *See* L.D. 1749, Statement of Fact (111th Legis. 1983) ("This will tend to avoid situations where persons charged with operating under the influence are not brought to trial quickly, due to backlog of court cases or delaying tactics used by the defendant.")

Given the explicit language provided by the Legislature, we conclude that any punitive or deterrent purpose served by the suspension of an operator's driver's license following an arrest for OUI is merely incidental to the overriding purpose intended by the Legislature to provide the public with safe roadways. Although we acknowledge that any suspension may have a deterrent effect on the law-abiding public, our analysis does not focus on that perspective. In the eyes of the defendant even remedial sanctions may carry a "sting of punishment." *Halper*, 490 U.S. at 447 & n. 7.

The entry is:
Judgments affirmed.

All concurring.

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STATE OF MAINE
Kennebec, ss

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. Ken-95-79

State of Maine

vs.

PROCEDURAL ORDER

Donald Dostie

It is hereby ORDERED all proceedings in the above named appeal be STAYED pending the Law Court's decision in State v. Savard, AND-95-5, and State v. Greeley, Ken-95-46. The record on appeal shall be retained by the Superior Court.

Dated: February 9, 1995

For the Court,

_____
Chief Justice

Signed by: David E. Wathan

STATE OF MAINE KENNEBEC, SS.		SUPERIOR COURT CIVIL ACTION DOCKET NOS. CR-93-717 CR-94-034 CR-94-234
STATE OF MAINE v. BARBARA YORK-BRYER, Defendant and STATE OF MAINE v. DONALD DOSTIE, Defendant and STATE OF MAINE v. ROBERT A. STEPHENS, Defendant	)	DECISION AND ORDER

These three case involve charges against the defendants for operating under the influence of intoxicating liquor (OUI). In each case, the defendant has moved to dismiss on double jeopardy grounds. Each defendant claims that because the Secretary of State, pursuant to 29 M.R.S.A. §1311-A, administratively suspended his or her driver's license, the subsequent criminal prosecutions for OUI constitute an attempt by the State to punish the defendants twice for the same conduct. Because the issues presented by these Motions are identical, this consolidated Decision and Order is issued for all three cases. For the reasons described herein, the defendants' arguments must fail, and their Motions to Dismiss are denied.

DECISION

Double Jeopardy

The Fifth Amendment to the Constitution of the United States states, in part, "No person shall...be subject for the same offence to be twice put in jeopardy of life or limb...." U.S. Const. amend. V. The Maine Constitution contains a similar prohibition: "No person, for the same offense, shall be twice put in jeopardy of life or limb." Me. Const. art. I, §8. In a recent federal case, the United States District Court for the Western District of Washington described the protections afforded under the Double Jeopardy Clause:

> The Double Jeopardy Clause "represents a fundamental ideal in our constitutional heritage." *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969). It protects against a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). The Clause is not limited to "life or limb" sanctions; it applies to imprisonment and monetary penalties as well.

United States v. McCaslin, 863 F.Supp. 1299, 1301 (W.D.Wash. 1994) (citations omitted). Accord *Department of Revenue of Montana v. Kurth Ranch*, ---, U.S. ---, ---114 S.Ct. 1937, 1941 n.1, 128

L.Ed.2d 767, 773 n.1 (1994). Based on this description alone, the pending Motions might be dismissed, since none involves life or limb or imprisonment or monetary penalty, but only suspension of the defendants' driver's licenses. But in *United States v. $405,089.23 in U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), the Ninth Circuit court of Appeals said, "Whatever other abuses the [Double Jeopardy] Clause prohibits, at its most fundamental level, it protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense." *Id.* at 1215. To the extent that the license suspension may be "punishment," additional analysis is required.

In the cases at bar, the State argues that double jeopardy is not implicated, since in order for the issue to arise in the first instance, there must have been a previous exercise of judicial authority. The State relies on a statement of the Maine Supreme Judicial Court, sitting as the Law Court, in *State v. Tise*, 283 A.2d 666 (Me. 1971). In that case, the Law Court state:

> [T]he purpose of the constitutional interdiction against double jeopardy was aimed to prevent double punishment by *judicial* action. Jeopardy begins...when a Defendant is put on trial before a court of competent jurisdiction, upon an indictment sufficient in form and substance to sustain a conviction and the jury has been charged with his deliverance.
>
> (A.14)

Id. at 667 (emphasis original). If this statement of the law continues to have force in the face of recent Supreme Court and other federal court cases, then the analysis is complete. In the present cases, the license suspensions were accomplished administratively by the Secretary of State. There can be no question that the Secretary of State's actions are not "judicial" action. There may be some questions, however, of how much force the Law Court's statement in *Tise* continues to have. Federal cases show that jeopardy does not necessarily require a "criminal" proceeding (see, e.g., *McCaslin*, (civil forfeiture proceeding constituted jeopardy); *Kurth Ranch*, (tax statute, as applied, created jeopardy)) or even a contested trial, see *McCaslin*, 863 F.Supp. at 1305 ("Jeopardy is complete-i.e., the constitutional bar against a second punishment for the same offense arises--when a judgment based on a guilty plea or an agreed resolution of the case is entered. A contested trial is not necessary.") Of course, it may reasonably be argued that the *Tise* requirement of "judicial" action is not to the contrary, even if the "criminal" forum is not requisite.

Assuming without deciding that *Tise* is not dispositive of these cases, however, the test to be applied for double jeopardy analysis is set forth in *$405,089.23 in U.S. Currency*. In determining whether the Double Jeopardy Clause has been violated, the court must apply a two-pronged test: (1) did the license suspension proceeding and the criminal prosecution constitute separate proceedings; and (2) does the license suspension constitute punishment. "If the answer to both of these questions

is yes, then the government's actions constituted a successive attempt to impose punishment, in violation of the Double Jeopardy Clause." *$405,089.23 in U.S. Currency*, 33 F.3d at 1216.

Separate Proceedings

In *McCaslin*, the Court said, "[A] civil action aimed at exacting a penalty, and a criminal prosecution directed to the same offense, even when filed close in time constitute two proceedings when pursued in separate cases and concluded at different times." *McCaslin*, 863 F. Supp. 1304. Similarly, in *$405,089.23 in U.S. Currency*, the Ninth Circuit Court of Appeals found that there were two separate actions, one civil and one criminal, where they were "instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments...." *$405,089.23 in U.S. Currency*, 33 F.3d at 1216.

Clearly, in the cases under examination, the proceedings before the Secretary of State were not the same as the proceedings before the court. Although there are decisions holding that separate cases pursued as part of a coordinated enforcement effort amount to a single proceeding for double jeopardy purposes, see e.g., *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993), *cert. denied*, *Bottone v. United States*, ___ U.S. ___, 114 S.Ct. 922, 127 L.Ed.2d 215 (1994), and *United States v. One Single Family Residence*, 13 F.3d 1493 (11th Cir. 1994), those cases appear to have been undercut by *Kurth Ranch*, at least where one case is completed and reduced to judgment while the

other is still pending.[1] *McCaslin*, 863 F.Supp. at 1304. Moreover, as a matter of legal principle, it is inappropriate to resort to such a legal fiction in order to circumvent the constitutional prohibition against double jeopardy, especially where a single prosecution containing multiple counts, including both civil and criminal sanctions, might have been pursued. See *United States v. Halper*, 490 U.S. 435, 450 (1989) (Government may constitutionally seek and obtain both civil and criminal penalties in the same proceeding).

Finally, the Maine Law Court views the Secretary of State's suspension authority, under 29 M.R.S.A. §1312-D (suspension imposed pursuant to conviction of OUI), to be separate from and in addition to that of the court. *Benedix v. Secretary of State*, 603 A.2d 473, 474 (Me. 1992). Viewing the OUI statute as a whole, it is clear that the Secretary of State's suspension authority under 29 M.R.S.A. §1311-A (suspension on administrative determination prior to conviction), is also separate from that of the court.

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[1] In Maine, the statute provides that the period of any administrative license suspension imposed by the Secretary of State under 29 M.R.S.A. §1311-A, must be deducted from any court-imposed suspension after adjudication or conviction on charges arising out of the same occurrence. 29 M.R.S.A. §1311-A(5)(C) (Pamph. 1994). Thus, in Maine there is stronger support for the argument that the administrative and criminal sanctions available for OUI violations constitute a coordinated enforcement effort amounting to but a single proceeding for double jeopardy analysis.

Thus, it must be concluded, and the parties do not dispute, that the administrative license suspensions and the criminal prosecutions constitute separate proceedings. Answering the first question of the test described in *$405,089.23 in U.S. Currency* in the affirmative, it is necessary to determine whether the license suspensions constitute "punishment" for double jeopardy purposes.

Punishment

Counsel for Defendant York-Bryer correctly points out that whether a license suspension is denominated "civil" or "criminal" is not relevant to the present inquiry, since civil sanctions may be imposed for purposes including punishment. In *Halper*, the Supreme Court said, "[V]iolation [of the Double Jeopardy Clause] can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *Halper*, 490 U.S. at 447. The Court warned, however, that such assessment is not to be made from the defendant's perspective, where even remedial sanctions can carry the sting of punishment. Instead, "in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." *Id.* at 447 n.7.

The Court went on to describe the nature of the penalty which will implicate the Double Jeopardy Clause:

> [T]he determination whether a given civil sanction constitutes punishment in

> the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goal of punishment.

Id. at 448. A sanction "serves the goal of punishment" when it "cannot fairly be said *solely* to serve a remedial purpose, but rather can *only* be explained as also serving either retributive or deterrent purposes...." *Id.* (emphasis added). It is significant that the Court evaluated the sanction "as applied in the individual case," since the decision rested on the case-specific fact that the civil sanction there at issue was found to be "so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." *Id.* at 443. In other cases where similar civil sanctions, as applied, resulted in "rough remedial justice" providing compensation to the government "according to somewhat imprecise formulas," *Id* at 446, no double jeopardy problems were recognized. Such problems arise only "when one of those imprecise formulas authorizes a supposedly remedial sanction that does not remotely approximate the Government's damages and actual costs and rough justice becomes clear injustice." *Id.*

Analysis in this case does not end with a determination that the license suspension might have served other than purely remedial purposes.

In *Kurth Ranch*, the Supreme Court found that although the drug tax under review in part served the purpose of deterrence, the fact alone was not dispositive of whether the sanction constituted punishment:

> [N]either a high rate of taxation nor an obvious deterrent purpose automatically marks this tax a form of punishment...Thus, while a high tax rate and deterrent purpose lend support to the characterization of the drug tax as punishment, these features, in and of themselves, do not necessarily render the tax punitive.

Kurth Ranch, ___ U.S. at ___, 114 S.Ct. at 1946-47, 128 L.Ed.2d at 779. Just as the drug tax in *Kurth Ranch* was not punishment solely because one of its purposes was deterrence, so an administrative license suspension is not "punishment" merely because it serves other than solely remedial purposes.

What, then, are the purposes served by an administrative license suspension after an arrest for OUI? In *State v. Granville*, 336 A.2d 861 (Me. 1975), the Law Court reviewed Maine's implied consent statute (29 M.R.S.A. §1312) to determine the admissibility of the results of a breathalator test taken by the defendant absent a complete explanation by the arresting officer of the consequences of submitting to

the test.[2] The Court said, "[S]tatutory provision for suspension of the license for refusal to take the test would not be penal in nature since...a privilege [to obtain and hold an automobile operator's license]...for valid reasons involving public safety may be granted or withheld by the State." *Id* at 863.

The defendants cite no authority to support their contention that administrative license suspension serves the purpose of punishment. While the defendants are correct in their assertion that licenses are constitutionally protected interests, their reliance on *Bell v. Burson*, 402 U.S. 535 (1971), is misplaced. That case stands only for the proposition that "licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id.* at 539. The Maine Law Court has said as much. In *Opinion of the Justices*, 255 A.2d 643 (Me. 1969), the Court said, "It is true that the State may not unreasonably, arbitrarily or capriciously withhold a license but it may properly condition the grant upon compliance with reasonable police power requirements." *Id.* at 649. Nothing in those cases dealt in any fashion with double jeopardy, and the defendants in the cases at bar do not contend that they were denied due process in having their licenses

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[2] The statute as it existed at the time of the arrest required the arresting officer to inform the defendant of the consequences of submission to a blood-alcohol test before the results of such test could be admitted into evidence during the trial for OUI.

suspended, only that their licenses were suspended for purposes of punishment.

To the contrary, however, an examination of the legislative intent of the statute leads to the conclusion that punishment is *not* one of the goals of suspension. In its examination, "[t]he court considers the history and the policy of a statute in ascertaining legislative intent." *State v. Jones*, 457 A.2d 1116, 1120 (Me. 1983). Since its original enactment in 1983, 29 M.R.S.A. §1311-A, has contained an explicit statement of its purpose:

> **1. Purpose.** The purpose of this section is:
>
> **A.** To provide maximum safety for all persons who travel or otherwise use the public highways of the State; and
>
> **B.** To remove quickly from the public highways of this State those persons who have shown themselves to be a safety hazard by operating or attempting to operate a motor vehicle with an excessive blood-alcohol level.

29 M.R.S.A. §1311-A(1) (Pamph. 1994). This present statement of legislative purpose is identical to the original enactment of P.L. 1983, c. 505, §1, by the 111th Legislature 1st Regular Session, and to P.L. 1983, c. 850, §1, under which the 111th Legislature 2nd Regular Session repealed and replaced the section. Nothing in the plain language of the statute provides any indication that punishment was one of the goals of the Legislature, and

there is no ambiguity in the statute requiring further examination to determine legislative intent. See *Chase* v. Edgar, 259 A.2d 30, 32 (Me. 1969) ("Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning.").

In previous cases, the Law Court has declared the legislative intent of the OUI statutory scheme. The Court said, "[F]or valid reasons involving the *public safety* [the driving privilege] may be granted or withheld by the State. *Opinion of the Justices*, 255 A.2d at 649 (emphasis added). In *State v. Jones*, the Court declared, "[T]he Legislature intended...under the implied consent statute...to achieve the collective goals of *deterring drunk driving* and *promoting highway safety*." *Jones*, 457 A.2d at 1121 (emphasis added). In the more recent case of *Benedix v. Secretary of State*, the Court observed, "The legislative intent gleaned from the overriding purpose of the OUI statutes..., [which o]ver the past 15 years the legislature has worked and reworked...at nearly every session [, is] a consistent attempt to *stop the lethal problem of drunken drivers*." *Benedix*, 603 A.2d at 475 (emphasis added). Nothing in these pronouncements indicates that punishment is in any way a purpose of the OUI statute providing for the administrative suspension of a driver's license.

The cases cited by the defendants do not control the cases under consideration here. In *Halper*, the Court announced "a rule for the rare

case...where a fixed penalty provision subjects a[n]...offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason...." *Halper*, 490 U.S. at 449. *Halper* involved federal civil sanctions for fraud and, unlike the present cases, required a judicial proceeding in order to impose the penalties. Moreover, the *Halper* Court narrowed the case's applicability:

> [T]he only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty on him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole.

Id. at 451 (footnote omitted). In *Kurth Ranch*, the Court's decision rested on its evaluation of a drug tax which, "[t]aken as a whole,...is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purposes of Double Jeopardy analysis." *Kurth Ranch*, ___ U.S. at ___, 114 S.Ct. at 1948, 128 L.Ed.2d at 781. The case of *$405,089.23 in U.S. Currency* was a civil forfeiture case brought after the defendant was criminally convicted of drug offenses. All of these cases fall under traditional double jeopardy analysis since they involve monetary penalties, unlike the cases at bar, which involve only administrative license suspensions. (A.24)

The Ohio case of *State v. Gustafson*, No. 93-TR 5344 A,B (Mahoning Cty., Nov. 16, 1994 (Lisotto, J.), and the Florida case of *State v. Reilly*, No. 94-6661MM10 (Broward Cty. Dec. 22, 1994) (Rothschild, J.), are both wrongly decided and distinguishable from the cases here. First, the Ohio and Florida courts extend the above-cited federal cases beyond their intended bounds. These courts place too much emphasis on the *Halper* Court's statement that *any* deterrent or punitive purpose of a civil sanction renders the sanction subject to double jeopardy proscription. The state courts, however, ignore the fact that the Supreme Court in *Kurth Ranch* said that a deterrent purpose in and of itself will not render a civil sanction punitive. In addition, the courts of Ohio and Florida failed to appreciate the distinction between the federal cases, which focused on whether the monetary penalties under review were remedial to the extent that they roughly compensated the government for its damages in investigating and prosecuting the criminal violations, and these cases, which in no way involve the government's expenses incurred through criminal enforcement. In the present cases, the license suspensions are not intended for remedial, but rather for public safety, purposes. Finally, in neither the Ohio nor the Florida decisions was there any indication that the statutory schemes, under which the defendants' driver's licenses were suspended, were intended to further public safety goals, as the Maine statute is expressly intended.

Burden of Proof

Finally, the State has made no

argument with respect to the defendants' burden of proof on the double jeopardy issue. But it requires no citation to authority on the well-settled point that a party challenging the constitutionality of a statute bears the burden of proof. In *Kurth Ranch*, Justice O'Connor addressed this point in her dissent:

> The presumption of constitutionality to which every state statute is entitled means in this context that a sanction denominated as civil must be presumed to be nonpunitive. This presumption would be rendered nugatory if the government were required to prove that the sanction is in fact nonpunitive before imposing it in a particular case. Rather, the defendant must show that the sanction may be punitive as applied to him before the government can be required to justify its imposition.

Kurth Ranch, ___ U.S. at ___, 114 S.Ct. at 1954-54, 128 L.Ed.2d at 789 (O'Connor, J., dissenting).

In the present cases, defendant Dostie makes the bald assertion that the license suspension is a "penalty", but offers no support that the suspension serves a punitive, rather than a public safety, purpose. Defendant Stephens also baldly asserts that the suspension is a "penalty" and further states that the loss of a license is "[c]learly...a punishment." The defendants rely for support of these contentions on the decisions in *Halper*, *Kurth Ranch*, *$405,089.23 in U.S. Currency* and *McCaslin*. No legal

argument is presented, however to justify extending those decisions beyond their facts to these cases, which do not involve monetary sanctions. Defendant York-Bryer also relies on the federal cases discussed above, but she, too fails to present convincing legal argument for extending double jeopardy analysis beyond its traditional concern for life and limb and imprisonment and monetary penalties or for applying the federal case law, by analogy, beyond their narrow, fact-specific holdings.

Conclusions

For all of the foregoing reasons, the defendants' arguments that an administrative license suspension stemming from an arrest for OUI constitutes jeopardy which bars subsequent criminal prosecution must fail. The administrative suspensions are imposed for public safety purposes, not punishment. The administrative sanction is not so disproportionate or unrelated to the legitimate, nonpunitive goals of the state as to render the suspension "punishment" such that constitutional double jeopardy prohibitions are violated. The cases relied upon by the defendants are distinguishable on their facts and are narrowly decided to apply only to the issues presented therein. Those decisions will not be extended to apply to these cases. Finally, the defendants have failed to fulfill their burdens of proof and have not shown that the administrative license suspensions, as applied to them, constitute punishment which precludes, under the Double Jeopardy Clauses of the United States and Maine Constitutions, further criminal prosecution for OUI.

ORDER

It is therefore ORDERED, and the entry shall be:

Each defendant's Motion to Dismiss, based on violation of the state and federal constitutional prohibitions against double jeopardy, are hereby DENIED.

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to incorporate this decision into the docket by reference.

DATED: January 31, 1995

Robert E. Crowley,
Justice
Superior Court

Signed by: Robert E. Crowley

MRSA 29 § 1311-A, Suspension on administrative determination for operating with an excessive blood-alcohol level

1. **Purpose.** The purpose of this section is:

A. To provide maximum safety for all persons who travel or otherwise use the public highways of the State; and

B. To remove quickly from the public highways of this State those persons who have shown themselves to be a safety hazard by operating or attempting to operate a motor vehicle with an excessive blood-alcohol level.

1-A. **Definition.** For the purposes of this section, "operating or attempting to operate a motor vehicle with an excessive blood-alcohol level" means operating or attempting to operate a motor vehicle while having 0.08% or more by weight of alcohol in the blood.

2. **Suspension.** The Secretary of State shall make the determination of suspension as follows.

A. The Secretary of State shall suspend the license or permit to operate, right to operate a motor vehicle and right to apply for or obtain a license of any person upon his determination that the person operated or attempted to operate a motor vehicle with an excessive blood-alcohol level.

B. The Secretary of State shall make a determination on the basis of the information required in subsection 3, and this

determination shall be final unless a hearing is requested and held. If a hearing is held, the Secretary of State shall review the matter and make a final determination on the basis of evidence received at the hearing.

C. Except as provided in paragraph D, the determination of these facts by the Secretary of State is independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect any suspension under this section. Statements made by the licensee at the hearing before the Secretary of State shall not be introduced by the State in its case in chief in any prosecution for violation of section 1312-B or Title 15, section 3103, subsection 1, paragraph F, arising out of the same occurrence.

D. Repealed. Laws 1989, c. 502, Sec. B, 33, eff. June 30, 1989.

E. The Secretary of State may not suspend a license or permit to operate, the right to operate a motor vehicle and the right to apply for or obtain a license solely because a person has not satisfactorily completed an alcohol or other drug education, evaluation and treatment program administered by the Department of Human Services, as defined in Title 22, chapter 1602. (FN1) This limitation shall not affect the authority on restoration provided under section 1312-D,

subsections 2, 3 and 4.

3. **Report by law enforcement officer.** A law enforcement officer shall forward a report to the Secretary of State as follows.

A. A law enforcement officer who arrests, summons or conducts an investigation which results in criminal charges against any person for operating or attempting to operate a motor vehicle with an excessive blood-alcohol level shall immediately forward to the Secretary of State a report, under oath of all information relevant to the enforcement action, including information which adequately identifies the person arrested, summonsed or charged, a statement of the officer's grounds for belief that the person committed the offense of operating or attempting to operate a motor vehicle with an excessive blood-alcohol level, and a certificate under section 1312, subsection 8, of the results of any blood-alcohol tests by a self-contained breath-alcohol testing apparatus which were conducted.

B. The report required in this subsection shall be made on forms supplied by or approved by the Secretary of State.

C. If the blood-alcohol test was not analyzed by a law enforcement officer, the person who analyzed the results shall cause a copy of his certificate under section 1312, subsection 8, to be sent to the Secretary of State.

4. Notice of suspension. The notice of suspension by the Secretary of State shall be made as follows.

A. Upon receipt of the information required in subsection 3, the Secretary of State shall make the determination described in subsection 2. If the Secretary of State determines that the person is subject to license suspension, he shall immediately issue a notice of suspension.

B. The notice of suspension must be sent in accordance with section 2241, subsection 4, or to the address provided in the report of the law enforcement officer if that address differs from the address of record. The notice is deemed received 3 days after mailing, unless returned by postal authorities.

C. The notice of suspension shall clearly specify the reason and statutory grounds for the suspension, the effective date of the suspension, the right of the person to request a hearing, the procedure for requesting a hearing and the date by which that request for a hearing shall be made. The notice of suspension shall also clearly state that a copy of the report of the law enforcement officer under subsection 3, paragraph A, and a copy of the blood-alcohol test certificate under subsection 3, paragraph A or C, will be provided to the person upon request to the Secretary of State.

5. Effective date and period of

suspension. The effective date and period of suspension are determined as follows.

A. Any suspension imposed is effective on a specified date not less than 10 days after the mailing of the notification of suspension by the Secretary of State. If a person whose license is suspended desires to have a hearing, the person must so notify the Secretary of State, in writing, within 10 days from the effective date of the suspension. The suspension is stayed for 10 days from the effective date of the suspension. If, within 10 days from the effective date of the suspension, the Secretary of State is notified, in writing, of a request for a hearing, the suspension is stayed until a hearing is held and a decision is issued. The Secretary of State shall conduct a hearing and issue a decision within 30 days from the date of receipt of a written request for hearing. Failure by the Secretary of State to conduct a hearing and issue a decision within such 30-day period results in an extension of the stay of the Secretary of State's suspension order until such time as a hearing is conducted and a decision issued. Notwithstanding this subsection, there may be no stay of suspension during the period of any delay in hearing that is caused or requested by the petitioner, except that, if the petitioner is unable to attend the hearing due to circumstances beyond the petitioner's control, the Secretary of State may continue,

one time only, the stay of suspension. The petitioner must submit to the Secretary of State a written request for delay, or an electronically transmitted facsimile of a written request for delay, stating the circumstances, at least 24 hours before the scheduled hearing.

B. Except as provided in paragraph B-1, the period of license suspension for a person whom the Secretary of State has determined to have operated or attempted to operate a motor vehicle with an excessive blood-alcohol level for a first or subsequent offense is the same suspension period as if the person were convicted or adjudicated of a violation of section 1312-B or Title 15, section 3103, subsection 1, paragraph F.

B-1. If the Secretary of State determines that a person with an excessive blood-alcohol level operated or attempted to operate a motor vehicle with a passenger under 16 years of age, the Secretary of State may impose a suspension period of up to 275 days, in addition to the suspension period under paragraph B.

C. When a person's license is suspended under this section and is also suspended after having been adjudicated or convicted on charges arising out of the same occurrence for a violation of section 1312-B or Title 15, section 3103, subsection 1, paragraph F, the period of time the license has been suspended

under this section prior to the adjudication or conviction must be deducted from the period of time of any court-imposed suspension ordered pursuant to section 1312-B or Title 15, section 3103, subsection 1, paragraph F. The periods of suspension are intended to be minimum periods of suspension and the Secretary of State may suspend the license for the additional periods as provided in section 1312-D, subsection 1-B.

5-A. **Work-restricted license.** Upon receipt by the Secretary of State of a petition for a work-restricted license by any person whose license or right to operate a motor vehicle has been suspended pursuant to this section, the Secretary of State may stay the suspension during a statutory suspension period and issue a work-restricted license. The issuance of such a license shall be conditioned upon a showing by the petitioner by clear and convincing evidence that such a license is necessary to operate a motor vehicle between the residence and a place of employment or to operate a motor vehicle in the scope of employment, or both, as determined by the Secretary of State, that no alternative means of transportation is available, and that the petitioner has not, within 6 years, been suspended:

A. For failing to comply with the duty to submit to and complete a chemical test;

B. Pursuant to this section; or

C. For a conviction of operating under the influence of intoxicating liquor or drugs or with an excessive blood-alcohol

level or the corresponding juvenile offense.

6. Restoration of license. The Secretary of State may issue a license or permit as follows.

A. Restoration of any license or permit to operate, right to operate a motor vehicle and right to apply for or obtain a license suspended under this section shall be in accordance with section 1312-D, subsections 2 to 4.

7. Request for hearing. A person who has received notice of suspension may request a hearing as follows.

A. Any person who has received a notice of suspension under this section may make a written request for a review of the determination of the Secretary of State at a hearing.

B. The request for a hearing shall be made within 10 days from the effective date of the suspension. If a written request for a hearing is made after the 10-day period and the Secretary of State finds that the person was unable to make a timely request due to lack of actual notice of the suspension or due to factors of physical incapacity, the Secretary of State shall waive the period of limitation, reopen the matter and grant the hearing request, except, in such a case, a stay of the suspension pending the hearing shall not be granted.

8. Hearing. The hearing and notice shall be as follows.

A. The hearing and notice shall be as provided in section 2241, subsection 3.

B. The scope of the hearing shall include whether, by a preponderance of the evidence:

(1) There was probable cause to believe that the person was operating or attempting to operate a motor vehicle while having 0.08% or more by weight of alcohol in his blood;

(2) The person operated or attempted to operate a motor vehicle; and

(3) At the time the person had 0.08% or more by weight of alcohol in his blood.

C. A certificate duly signed and sworn to pursuant to section 1312, subsection 8, shall be prima facie proof of facts stated therein and that the person taking a specimen of blood or breath was authorized by section 1312, subsection 6, that the equipment, chemicals and other materials used in the taking of the blood specimen or breath sample were of a quality appropriate for the purpose of producing reliable test results that any equipment, chemicals or materials required by section 1312, subsection 6, to be approved by the Department of Human Services were in fact approved, that the sample tested by the person certified under section 1312, subsection 6, was in fact the same sample taken and that the percentage by weight of

alcohol in the blood was, at the time the blood or breath sample was taken, as stated in the certificate.

D. If it is determined after hearing that there was not the requisite probable cause for blood-alcohol test administration or that the person did not operate or attempt to operate a motor vehicle while having 0.08% or more by weight of alcohol in his blood, the suspension shall be removed immediately and the Secretary of State shall delete any record of the suspension.

E. Any person whose license is suspended under this section on the basis of blood-alcohol test may, within 30 days after receipt of the decision, appeal to the Superior Court for judicial review, as provided in Title 5, sections 11001 to 11008. If the court rescinds the suspension, it shall also order the Secretary of State to delete any record of the suspension.

MRSA 29 § 1312-B, Criminal violation of operation under the influence of intoxicating liquor or drugs or with an excessive blood-alcohol level; penalties

1. **Offense.** A person is guilty of a criminal violation under this section if he operates or attempts to operate a motor vehicle:

A. While under the influence of intoxicating liquor or drugs or a combination of liquor and drugs; or

B. While having 0.08% or more by weight of alcohol in his blood.

1-A. **Pleading and proof.** The alternatives defined in subsection 1, paragraphs A and B may be pleaded in the alternative. The State may, but shall not be required to, elect prior to submission to the fact finder.

1-B. **Repealed.** Laws 1991, c. 51, eff. April 29, 1991.

2. **Penalties.** The offense defined in subsection 1 is a Class D crime. In the determination of an appropriate sentence, refusal to submit to a chemical test shall in every case be an aggravating factor. In the following cases the following minimum penalties shall apply.

A. Except as provided in paragraph B, in the case of a person having no previous convictions of operating under the influence of intoxicating liquor or drugs, or a combination of liquor or drugs, or with an excessive blood-alcohol level and having no previous suspension of license or privilege to operate for failure to comply with the duty to submit to and complete chemical

testing under section 1312 within a 6-year period, the fine may not be less than $300 and the court shall suspend the defendant's license or permit to operate, right to operate a motor vehicle and right to apply for and obtain a license for a period of 90 days, which penalties may not be suspended.

B. In the case of a person having no previous convictions of operating under the influence of intoxicating liquor or drugs, or a combination of liquor or drugs, or with an excessive blood-alcohol level and having no previous suspension of license or privilege to operate for failure to comply with the duty to submit to and complete chemical testing under section 1312 within a 6-year period, the fine may not be less than $300, the sentence must include a period of incarceration of not less than 48 hours and the court shall suspend the defendant's license or permit to operate, right to operate a motor vehicle and right to apply for and obtain a license for a period of 90 days. These penalties may not be suspended when the person:

(1) Was tested as having a blood-alcohol level of 0.15% or more;

(2) Was driving in excess of the speed limit by 30 miles an hour or more during the operation that resulted in the prosecution for operating under the influence or with a blood-alcohol level of 0.08% or more;

(3) Eluded or attempted to

elude an officer, as defined in section 2501-A, subsection 3, during the operation that resulted in prosecution for operating under the influence or with a blood-alcohol level of 0.08% or more;

(4) Failed to submit to a chemical test for the determination of that person's blood-alcohol level or drug concentration at the request of a law enforcement officer on the occasion that resulted in the conviction; or

(5) Was, on the occasion that resulted in the conviction, operating or attempting to operate a motor vehicle with a passenger under 16 years of age.

C. In the case of a person having one previous conviction of operating under the influence of intoxicating liquor or drugs, or a combination of liquor or drugs, or with an excessive blood-alcohol level or having at least one previous suspension for failure to comply with the duty to submit to and complete chemical testing to determine the level of blood-alcohol or drug concentration under section 1312 within a 6-year period, the fine may not be less than $500, the sentence must include a period of incarceration of not less than 7 days and the court shall suspend the defendant's license or permit to operate, right to operate a motor vehicle and right to apply for and obtain a license for a period of one

year, which penalties may not be suspended.

D. In the case of a person having 2 or more previous convictions of operating under the influence of intoxicating liquor or drugs, or a combination of liquor or drugs, or with an excessive blood-alcohol level within a 6-year period, the fine may not be less than $750, the sentence must include a period of incarceration of not less than 30 days and the court shall suspend the defendant's license or permit to operate, right to operate a motor vehicle and right to apply for and obtain a license for a period of 2 years, which penalties may not be suspended.

D-1. In addition to the penalties provided under paragraphs C and D, the court shall order the defendant to participate in the Weekend Intervention Program administered by the Office of Substance Abuse, as defined in Title 5, chapter 521. (FN1) The court may waive the Weekend Intervention Program under Title 5, section 20073-A, subsection 3, if the court finds that the defendant has completed a residential treatment program, or its equivalent, subsequent to the date of the offense.

E. The penalties provided under paragraphs A, B, C and D may not be suspended by the court. The court shall give notice of the suspension and take physical custody of the operator's license as provided in section 2241-H. The Secretary of State may impose an additional period of suspension as provided in section 1312-D, subsection 1-B, or may extend any period of suspension

until satisfaction of any conditions imposed pursuant to section 1312-D, subsection 3.

F. For purposes of this section, a prior conviction has occurred within the 6-year period provided if the date of docket entry by the clerk of a judgment of conviction or adjudication is 6 years or less from the date of the new conduct which is penalized or for which the penalty is or may be enhanced.

G. For the purposes of this section, a previous suspension of license of privilege for failure to comply with the duty to submit to and complete chemical testing under section 1312 has occurred within the 6-year period if the date of the suspension is 6 years or less from the date of the new conduct which is penalized or for which the penalty is or may be enhanced.

H. For the purpose of this section, a conviction of operating under the influence of intoxicating liquor or drugs, or a combination of liquor or drugs, or with an excessive blood-alcohol level includes:

(1) A conviction of a violation of former section 1312, subsection 10, of former section 1312-B or of this section;

(2) A conviction, in any jurisdiction that is or becomes a party to the driver license compact in chapter 7, subchapter III, (FN2) of any offense described in the compact under section 634, subsection 1, paragraph B

or of an offense that is similar to the offense provided in section 634, subsection 3;

(3) An adjudication or other determination made under the juvenile laws of this State or of another jurisdiction for conduct that, if committed by an adult, would have been a conviction included in this subsection, including the conduct under Title 15, section 3103, subsection 1, paragraph F; and

(4) A conviction in the tribal court of the Penobscot Nation or the Passamaquoddy Tribe, a court of the United States or a court of a state that is not a party to the driver license compact in chapter 7, subchapter III, provided that the punishment for the offense includes the possibility of incarceration, whether or not actually imposed on that occasion, and the elements of the offense as provided in the law of that jurisdiction include operation or attempted operation of a motor vehicle while intoxicated, impaired or under the influence of intoxicating liquor or drugs, or a combination of liquor or drugs, or with a blood-alcohol level sufficient for conviction under the laws of that jurisdiction.

2-A. Aggravated punishment category. If the State pleads and proves that the actor, while operating a motor vehicle in violation of this section, in fact caused serious bodily injury as defined in Title 17-A, section 2, subsection 23, to another person or in fact caused the death of another person, the sentencing class for the offense in subsection 1 is a Class C crime. The minimum penalties specified in subsection 2 apply, but the minimum period of suspension is 18 months unless a longer minimum period otherwise applies.

If the State pleads and proves that the actor, while operating a motor vehicle in violation of this section, had 3 or more previous convictions of operating under the influence of intoxicating liquor or drugs, or a combination of liquor or drugs, or with an excessive blood-alcohol level within a 6-year period, the sentencing class for the offense in subsection 1 is a Class C crime. The minimum penalties specified in subsection 2 apply, but the minimum fine is $1,000.

3. Sentencing procedure. Notwithstanding the provisions of Title 15, section 757, in determining the appropriate sentence, the court shall consider whether the defendant operated or attempted to operate a motor vehicle with a passenger under 16 years of age, the record of convictions for criminal traffic offenses, adjudications of traffic infractions and suspensions of license or privilege to operate for failure to comply with the duty to submit to and complete a test to determine the level of blood alcohol of the defendant. The court may rely upon oral representations based on records maintained by the courts, by the State

Bureau of Identification or by the Secretary of State, including telecommunications of records maintained by the Secretary of State. If the defendant disputes the accuracy of any representation concerning a conviction or adjudication, the court shall grant a continuance for the purposes of determining the accuracy of the record.

3-A. **Instructions at time of sentencing.** At the time of sentencing, the presiding judge shall provide the defendant with written instructions prepared by the Division of Driver Education Evaluation. The instructions shall be written in plain and readable language and at a minimum include the following:

A. An explanation of the circumstances under which the Secretary of State may suspend a driver's license;

B. An explanation of the different components in the process the defendant must go through to have a driver's license restored. The explanation shall include a description of the difference between those service components provided by state agencies and those provided by practitioners and counselors not employed by the State;

C. An explanation of the role of the Driver Education Evaluation Program Appeals Board and the circumstances under which the defendant has a right to make an appeal to the board;

D. An explanation of the differences between the procedures applicable to first offenders versus multiple

offenders and adults versus those under 21 years of age;

E. An explanation of when the Secretary of State may stay a suspension and grant a work-restricted license or other restricted or provisional license; and

F. An explanation of the conditions an offender must meet to have a license restored or conditions under which the Secretary of State may restore a license.

4. Juvenile crime. References in this Title to this section shall be deemed also to refer to the juvenile crime stated in Title 15, section 3103, subsection 1, paragraph F, and to the disposition, including a suspension, for that juvenile crime as provided in Title 15, section 3314, subsection 3, except as otherwise provided or except where the context clearly requires otherwise.

5. Surcharge. A surcharge must be added to every fine or penalty imposed by any court in this State pursuant to this section. The surcharge is $30, except that, when the person operated or attempted to operate a motor vehicle while under the influence of drugs or a combination of liquor and drugs, the surcharge is $125. For the purposes of collection and collection procedures, the surcharge is considered part of the fine or penalty. Notwithstanding section 2302, all funds collected as a result of this surcharge accrue to the Highway Fund for the purpose of covering the costs associated with the administration and analysis of chemical tests.